

**Letter of Findings: 04-20130059**  
**Gross Retail Tax**  
**For the Tax Years 2010-2011**

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**ISSUES**

**I. Sales Tax—Exempt Sales.**

**Authority:** IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-4-1; [45 IAC 2.2-8-12](#).

Taxpayer protests the imposition of sales tax on its sales transactions with a customer for which it has acquired an exemption certificate after the close of the audit.

**II. Tax Administration—Negligence Penalty.**

**Authority:** IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer requests that the Department abate the ten-percent negligence penalty.

**STATEMENT OF FACTS**

Taxpayer is an Indiana retail merchant selling a variety of chemicals and related equipment. The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records for the 2010 and 2011 tax years. As a result of that audit, the Department issued assessments of gross retail tax ("sales tax"), use tax, interest, and penalty. Taxpayer protested the sales tax and penalty assessments. Taxpayer's representative requested that the Department makes its decision based upon the information provided in its protest letter, and this Letter of Findings results.

**I. Sales Tax—Exempt Sales.**

**DISCUSSION**

Taxpayer provided a copy of an additional exemption certificate. Taxpayer indicates that this certificate was not considered during the original audit. However, the exemption certificate provided was signed and dated after the sales transaction(s) occurred. Thus, Taxpayer was asked to, and did provide a Form AD-70, which is the form that is allowed for a Taxpayer to demonstrate an exemption after the sales transaction has occurred.

IC § 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. IC § 6-2.5-1-2 defines a retail transaction as "a transaction of a retail merchant that constitutes selling at retail as described in IC § 6-2.5-4-1... or that is described in any other section of IC § 6-2.5-4." IC § 6-2.5-4-1(a) provides that "[a] person is a retail merchant making a retail transaction when he engages in selling at retail." IC § 6-2.5-4-1(b) further explains that a person sells at retail when he "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration."

During the audit, Taxpayer was unable to provide exemption certificates for certain of its transactions where sales tax was not collected. The auditor was therefore unable to verify that those sales were exempt from the sales tax. The relevant regulation is [45 IAC 2.2-8-12\(b\)](#) which states, "Retail merchants are required to collect sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used for an exempt purpose." The regulation cautions that, "Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof." [45 IAC 2.2-8-12\(d\)](#).

There is no question that Taxpayer entered into retail transactions for which – absent an exemption – Taxpayer was required to collect sales tax. Taxpayer has belatedly supplied an exemption certificate and a Form AD-70 from one of its customers for certain of its sales. The audit division is requested to review the late-filed exemption certificate and Form AD-70 and to make whatever adjustments it deems appropriate. However, Taxpayer is reminded that sales tax becomes due at the time of the transaction; either the purchaser is exempt at the time of the transaction or it is not exempt. If the purchaser claims an exemption, the exemption certificate should be obtained at the time the transaction occurs; otherwise the burden of proving the transaction was exempt becomes measurably more difficult.

**FINDING**

Taxpayer's protest to the imposition of sales tax is sustained subject to the results of the audit division's review. The audit division is requested to review the exemption certificate and Form AD-70 and to make whatever adjustments that are warranted.

**II. Tax Administration—Negligence Penalty.**

**DISCUSSION**

Taxpayer protests the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation [45 IAC 15-11-2\(b\)](#) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at [45 IAC 15-11-2\(c\)](#) as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

In this case, Taxpayer incurred a deficiency which the Department determined was due to negligence under [45 IAC 15-11-2\(b\)](#), and so was subject to a penalty under IC § 6-8.1-10-2.1(a). Taxpayer argues that it had reasonable cause for failing to collect and remit sales tax and for failing to pay use tax on its own purchases. Taxpayer states that he "set up his software to charge sales tax to his non-exempt customers. However, through a clerical error, the sales tax on the invoices did not calculate [and] [h]e did not notice [this]." Taxpayer also states that "when purchasing capital assets for which sales tax was not charged, he did not realize that he was not being charged sales tax and therefore did not include this on his sales tax return as use tax."

The Department finds that Taxpayer has not established that its failure to collect and remit sales tax or to pay sales or use tax on its own purchases was due to reasonable cause and not due to negligence, as required by [45 IAC 15-11-2](#). Taxpayer's own statements provide that its inattention to both its sales invoices and its purchases invoices is what led to its failure to collect and/or pay the proper amount of tax. Inattention is negligence. Additionally, Taxpayer did not have a use tax accrual and remittance system in place. Accordingly, the negligence penalty was properly imposed.

#### **FINDING**

Taxpayer's protest of the imposition of the penalty is respectfully denied.

#### **SUMMARY**

Taxpayer's protest to the imposition of sales tax is sustained subject to the results of the audit division's review of the exemption certificate and Form AD-70, as discussed in Issue I. Taxpayer's protest to the imposition of the negligence penalty is respectfully denied.

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